No. 01-1399

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

UNITED STATES *ex rel.* SWAFFORD,

Petitioner,

v.

BORGESS MEDICAL CENTER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ADVANCED VASCULAR SURGERY, P.C.; KRISHNA JAIN, M.D.; JOHN MUNN, M.D.; EUGENE SIMONI, M.D.; JOHN T. COLLINS, JR., M.D., AND RANDY SMEJKAL, M.D., P.C.; JOHN T. COLLINS, JR., M.D.; RANDY SMEJKAL, M.D.; JAMES MCLAREN, M.D.; SOLOMON K. SAMUELS, M.D.; PADRAIC CARMODY, M.D.; KARIM ABEDEL ABUSHMAIES, M.D.; AND M. ABIDUR RAHMAN, M.D.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, corporate Respondents Advanced Vascular Surgery, P.C., Randy Smejkal, M.D., P.C., Solomon K. Samuels, M.D., P.C., and Vascular Specialists, P.C., make the following disclosures:

1. Each of the foregoing corporate Respondents is a privately held corporation;

2. There is no parent or publicly held company owning 10% or more of stock in any of the foregoing corporate Respondents.

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I. COUNTER-STATEMENT OF THE CASE

Petitioner brought this action in the United States District Court for the Western District of Michigan in which he claimed that Respondents violated the False Claims Act, 31 U.S.C. § 3729, *et seq.* (the "Act"), by falsely charging the government for medical services which they allegedly did not perform adequately.[1] At issue were certain laboratory tests performed by vascular technicians, who prepared written reports setting forth the test results for each patient. It is undisputed that *for every patient* the Respondent-physicians reviewed the test results and prepared a written report setting forth their medical conclusions and findings, thereafter billing the federal government for an "*interpretation or reading of the **results*** of the test performed."[2] The gist of Petitioner's claim was that the information reviewed by the Respondent-physicians was somehow insufficient under the applicable "standard of care" to allow the physicians to make a medically adequate finding, and, in turn, submit a claim for those services.

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[1] Petitioner proceeded under the Act's *qui tam* provisions after the government declined to join the suit as a party. 31 U.S.C. § 3730(b)(2).

[2] The tests at issue consisted of two "components" under applicable billing guidelines. The technicians performed the "technical component" (defined as the "actual performance of the test"), following which the physicians performed the "professional component" (defined as the "interpretation or reading of the results of the test performed"). Consistent with these guidelines, after reviewing the test results and preparing their interpretive report, the physicians billed only for performing the "professional component."

Following discovery concerning the services provided by the physicians,[3] the District Court granted Respondents' motion for summary judgment because it was undisputed that the Respondent-physicians *actually provided* a service for *every* patient, because no applicable law or regulation required the service to be performed in the manner argued by Petitioner, and because claims under the Act cannot be based on issues of professional judgment or scientific methodology. Consequently, there was no basis on which it could reasonably be argued or found that the underlying claims were either "false" or presented with the requisite "scienter" to impose liability under the Act. The Sixth Circuit subsequently affirmed (by *per curiam* opinion) the District Court's grant of summary judgment.

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[3] Petitioner's "Statement of Facts" on appeal to the Sixth Circuit argued that the discovery process ordered by the District Court (reflecting a discovery order agreed to by the parties) somehow limited his argument on the issue of scienter. But neither there, nor here, does Petitioner identify any specific, material fact relied upon in the District Court's grant of summary judgment which remained unexplored or unsupported. In fact, Petitioner simply *never raised* this issue before the trial court, nor did he raise a claim that his ability to argue the scienter issue was somehow impaired because of inadequate discovery. Indeed, the Petitioner *failed to pursue* the full extent of the discovery agreed to by the parties and authorized by the District Court (e.g., by taking only three physician depositions even though six physician depositions were authorized, etc.). This issue was not decided below and should not be decided here. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470, 119 S.Ct. 924, 930, 142 L.Ed.2d 929 (1999).

II. REASONS FOR DENYING THE WRIT

Although the Petition argues various issues, the Petitioner's claim ultimately focuses on one basic question: should the Act be judicially reformed to reduce the statutorily mandated standard for imposing liability? The Act expressly requires a showing that the submitted claim was both "false," and presented with "actual knowledge, deliberate ignorance or reckless disregard of its falsity." 31 U.S.C. § 3729(a) and (b). Petitioner argues that the Act's standard of liability should be lowered to include claims based on a medical "standard of care," notwithstanding the plain language of the Act which expressly negates that proposition. As discussed below, the legal principles relied on by the District Court and Sixth Circuit are well-established and consistent with the requirements of the Act, and Petitioner's arguments are simply a quarrel with the application of the underlying facts to properly stated rules of law.

The District Court and Court of Appeals correctly applied both the provisions of the Act and well-established precedent under the Act. Further review is therefore unwarranted.

A. The District Court Properly Applied Both Statutory Provisions And Well-Established Case Law To Find That No False Claim Had Been Submitted. There Is No Circuit Conflict To Support The Court's Discretionary Exercise Of Certiorari Jurisdiction.

The District Court properly determined that Petitioner failed to present a genuine issue of material fact as to whether Respondents had submitted claims that were

false. "Falsity" for FCA purposes requires proof of an objective falsehood. *United States ex rel. Roby v. The Boeing Company,* 100 F.Supp.2d 619, 625 (S.D. Ohio 2000), *citing, United States ex rel. Hagood v. Sonoma County Water Agency,* 81 F.3d 1465, 1477-1478 (9th Cir. 1996). No evidence of intrinsic falsity, i.e., evidence that reimbursement was fraudulently sought for services not actually provided, was found. This conclusion was particularly compelling given Petitioner's inability to dispute that *for every patient,* the Respondent-physicians *actually* reviewed the test results reported by the technicians (the "technical component" of the test), following which the physicians prepared a written report reflecting their medical interpretation and judgment (the "professional component" of the test) regarding the presence of a deep vein thrombosis (DVT) or other vascular abnormality in the patient so the delivery of health services could be tailored accordingly. Simply put, the undisputed evidence demonstrated that the Respondent-physicians *actually* performed the service for which they submitted a claim.

Further, Petitioner produced no evidence of any extrinsic falsity that could give rise to liability under the Act, i.e., the failure to comply with some statute or regulation that was a material condition to receiving payment from the government. No specific laws or regulations have been promulgated to govern the submission of reimbursement claims for venous ultrasounds. Likewise, the District Court properly declined to judge the truth or falsity of Respondents' claims in light of guidelines *not applicable* to the physicians or by reference to allegedly analogous protocols published for other procedures; the District Court correctly found that these "standards"

were inapplicable to the claims submitted by Respondents (and the underlying medical studies), and lacked the binding effect of law. *National Medical Enterprises v. Bowen*, 851 F.2d 291, 293 (9th Cir. 1988). *See also, United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1020 (7th Cir. 1999) (noting that the Act is not a suitable vehicle for policing technical compliance with administrative regulations).

Ultimately, in arguing liability under the Act based on the allegedly applicable medical "standard of care," the Petitioner only raises a debate over issues of professional judgment and scientific methodology. It is well-established that the Act is not a proper forum for such debate. *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730 (7th Cir. 1999); *Hagood v. Sonoma County Water Agency, supra*, at 1478 (9th Cir. 1996).

The District Court and Sixth Circuit correctly ruled that Petitioner failed to produce evidence that the claims submitted by the Respondent-physicians were false under any factual or legal theory. The Petition in this case is nothing more than an attempt to reargue this factual finding, and should be denied.

B. The Court Correctly Found That The Respondent-Physicians' Practice With Regard To Interpretation Of Venous Ultrasound Studies Did Not Amount To Deliberate Ignorance Of, Or Reckless Disregard For, Applicable Guidelines For Submission Of Claims.

Nor did Petitioner come forward with evidence of scienter, i.e., evidence that the claims were presented

with "actual knowledge, deliberate ignorance or reckless disregard of its falsity." 31 U.S.C. § 3729(b). The District Court and Sixth Circuit also correctly granted summary judgment on this issue.

Both the express provisions of the Act and cases decided under it make clear that the "requisite intent is the knowing presentation of what is known to be false." *Hindo v. University of Health Sciences*, 65 F.3d 608, 613 (7th Cir. 1995), *citing, Hagood, supra; Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992) ("In short, the claim must be a lie"). Disputes as to the interpretation of regulations do not give rise to liability under the Act. *Hagood, supra,* at 1477. *See, United States ex rel. Lamers v. City of Green Bay, supra,* at 1019 (technical violations of a federal regulation on which a claim is based do not make the claim "false"); *Luckey v. Baxter Healthcare Corp., supra.*

Given the undisputed evidence that the Respondents *actually provided* a service *for every patient,* coupled with the lack of any applicable billing guidelines and evidence of ongoing efforts by the physicians to ensure compliance with any regulatory mandates, the District Court and Sixth Circuit properly found that Petitioner failed to produce evidence of the requisite scienter. On this issue as well, Petitioner's argument presents nothing more than an attempt to reargue the District Court's factual finding that the requisite scienter is lacking. The Petition should be denied.

C. The "Questions Presented" Do Not Warrant This Court's Exercise Of Discretionary Certiorari Jurisdiction.

The Petition also fails to set forth any compelling reasons why it should be granted. The principles of law relied on by the District Court and Sixth Circuit are consistent with the Act, and reflect well-established principles on which there is no conflict among the circuits or state courts of last resort. Likewise, Petitioner's characterization of his case as presenting "questions of national importance" is flawed, particularly since asserted error consisting in "erroneous factual findings or the misapplication of a properly stated rule of law" are not sufficiently compelling to invoke certiorari jurisdiction under Supreme Court Rule 10. Simply put, no question of national importance is presented, and there is no compelling basis for review. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470, 119 S.Ct. 924, 930, 142 L.Ed.2d 929 (1999); *Holly Farms Corp. v. National Labor Relations Board*, 517 U.S. 392, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996).

The District Court and Sixth Circuit Court's rulings fail to implicate any issue warranting further review of this matter. Respondents respectfully request this Honorable Court to deny the Petition for Writ of Certiorari.

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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